Editor's note: Appealed -- aff'd, Civ.No. 84-208 (E.D.Ky. Feb. 2, 1986), final order, (March 5, 1987)

HARRY SMITH CONSTRUCTION CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-621
IBSMA 82-23 Decided December 13, 1983

Appeal by Harry Smith Construction Company from the March 10, 1982, decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 80-2-39-7 and modifying Cessation Order No. 80-2-39-5.

Affirmed in part; reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Applicability: Generally -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

   In an application for review proceeding a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof

   Where an applicant for review fails to establish by a preponderance of evidence that a violation did not occur, a notice of violation will be sustained.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings -- Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Hearings: Notice -- Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

   Modification of a notice of violation or cessation order must be based on findings of fact and conclusions of law after a hearing with notice to the parties.

APPEARANCES: Forrest E. Cook, Esq., Whitesburg, Kentucky, for Harry R. Smith; John A. Pendergrass, Esq., Charles Gault, Esq., Walton D. Morris, Jr., Esq., Assistant Solicitor, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Office of Surface Mining Reclamation and Enforcement (OSM) inspector James Roger Begley visited Harry Smith's property in Letcher County, Kentucky, February 19, 1980. He saw on a bench remaining from previous mining 3 to 4 acres of freshly disturbed area and a pit with a small stockpile of coal nearby. 1/ Smith was operating a bulldozer when Begley arrived and continued to do so during Begley's inspection of the site. 2/ After the inspection Begley informed Smith that because he had disturbed more than 2 acres and removed more than 250 tons of coal his activities "fell under [OSM] jurisdiction and that [Begley] had to enforce the performance standards and write a violation for mining without a permit." 3/ Begley issued a notice of violation specifying violations of five performance standards and setting forth the required corrective action and issued a cessation order for mining without a permit. 4/ Smith filed an application for review of these enforcement actions on March 7, 1980, and a hearing was conducted on December 3, 1980, by Administrative Law Judge David Torbett. 5/ After receiving posthearing briefs the

1/ Tr. 9.
2/ Smith told Begley he was making a feed lot for his cattle there (Tr. 12).
3/ Tr. 13. Begley said he told Smith he had learned from the tipple at the foot of the hill that approximately 300 to 350 tons of coal had been taken there from the site the evening before. Id.
4/ Exhibits R-1 and R-2.
5/ On Mar. 27, 1980, OSM filed a motion to dismiss on the grounds that Smith's application for review failed to state a claim upon which administrative relief could be granted. Of the opinion that the motion was well taken, on Apr. 21, 1980, Administrative Law Judge Torbett issued an order that Smith file a pleading that met the requirements of 43 CFR 4.1164 within 10 days or be dismissed. Smith filed a response which reads in part:

"2. In its application for review, applicant made the following assertions:

"'(2) Applicant alleges that all violations hereinabove referenced fail to state a condition which constitutes a violation of the federal regulation pertaining thereto.

"'(3) Applicant denies that the conditions present and in existence at the site constituted violations as set forth in the NOV and cessation order.'

"3. If applicant succeeds in proving the averments contained in Paragraph (2) and (3) of its Application for Review, it certainly would prevail.

"4. Pleadings in OSM review proceedings, as with the Federal Rules of Civil Procedure, are merely intended to serve notice upon the respondent that a violation is being challenged. Should either party desire a more particular statement or additional information concerning any contested violation, they may, through the discovery procedures, ascertain the exact posture of their opponent's case.

"If an applicant seeks to assert affirmative defenses, they must set those out with specificity in their Application for Review." (Emphasis added.) Judge Torbett took no further action on the motion before, during, or after the hearing.

Administrative Law Judge issued a decision on March 10, 1982, sustaining the notice of violation and modifying the cessation order to a notice of violation. Smith filed a timely notice of appeal on the grounds (1) that OSM did not have jurisdiction over him, (2) that OSM did not establish any violation of the surface mining act or regulations, and (3) that the cessation order issued for failure to have a permit was improper and the Administrative Law Judge was without authority to cure such a defect at the hearing.

[1] Concerning appellant's challenge to OSM's jurisdiction Judge Torbett recited the conflicting testimony of Smith and Begley and then held:

> In any case, the facts as found by the undersigned fall within the gambit [sic] of James Moore, [1] IBSMA 216, 86 I.D. 369 (1979). In that case, at page 224, the Interior Board of Surface Mining [and] Reclamation Appeals held ". . . it is up to the alleged permittee to establish that he did not remove or intend to remove the requisite amount of coal." The Board explained the rational[e] for its decision by stating, "the permittee is the only one with ready access to the records to show how many tons were removed or sold within any period. In this case, Moore testified he kept no records. He also stated that he did not know exactly how much coal he had sold." The decision goes on to say, "and as in an affirmative defense, the one making the defense must establish it by pleading as well as proving it. It may be the failure to plead can be waived. Proof, though, absent * * * concession by the other party, is * * * essential.
>
> Putting the Applicant's case in its most favorable light, the best that can be said is that the proof is [in] equipoise. As the ultimate burden of persuasion is on the Applicant in a case of this type, the undersigned must find that the Respondent had jurisdiction.

Appellant presents his own summary of the evidence and then argues that "the Administrative Law Judge acted arbitrarily in not requiring further proof of Respondent's jurisdiction" (Appellant's Brief at 3-4). We cannot agree.

In administrative review proceedings under the Surface Mining Control and Reclamation Act of 1977 the Department has consistently followed the rule relied on by Judge Torbett that a person contesting OSM's jurisdiction must state and prove the grounds upon which this claim is based as an affirmative defense. 6/ Sam Blankenship, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983); Jewell

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6/ OSM asserts its jurisdiction when it serves a notice of violation or cessation order on a person. Notices and orders both contain a paragraph on the front page stating:

"UNDER THE AUTHORITY OF THE SURFACE MINING CONTROL AND RECLAMATION ACTION OF 1977 (P.L. 95-87; 30 U.S.C. § 1201), THE UNDERSIGNED AUTHORIZED REPRESENTATIVE OF THE SECRETARY OF THE INTERIOR has conducted an inspection of the above mine on the above date and has found that a notice of violation [or cessation order] must be issued for each violation(s) of the Act, the regulations, or required permit conditions listed in the attachment(s)."

Smokeless Coal Corp., 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982); Virginia Fuels, Inc., 4 IBSMA 185, 191, 89 I.D. 604, 607 (1982); Rhonda Coal Co., 4 IBSMA 124, 134, 139, 89 I.D. 460, 465, 467 (1982); Jewel Smokeless Coal Corp., 4 IBSMA 51, 62, 64-65, 89 I.D. 313, 318, 319 (1982); William M. Johnson, 3 IBSMA 377, 382, 88 I.D. 1112, 1115 (1981); Daniel Brothers Coal Co., 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980); James Moore, supra at 224, 86 I.D. at 374 (1979). OSM's initial burden in a review proceeding is limited to a prima facie showing 7/ that the person named in the notice or order was "engaged in a surface coal mining operation and failed to meet Federal performance standards." Rhonda Coal Co., supra at 134, 89 I.D. at 465 (1982). That is, the person was conducting an activity that falls within the definition of surface coal mining operations in 30 U.S.C. § 1291(28) (Supp. IV 1980) and the activity caused a violation of one or more of the regulations governing surface coal mining. Such a showing by OSM as to the validity of the notice or order under 43 CFR 4.1171(a) shifts to the applicant for review, under 43 CFR 4.1171(b), the burden of going forward and the ultimate burden of persuasion as to (1) whether he was conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether his activity is excepted from the coverage of the Act or regulations and therefore not subject to OSM jurisdiction. 8/

If a person challenges OSM's jurisdiction because he believes his surface coal mining operation is excepted from the coverage of the Act, he must not only come forward with supporting evidence but also carry the ultimate burden of persuasion if OSM attempts to rebut the evidence. 43 CFR 4.1171(b); Rhonda Coal Co., supra; Virginia Fuels, Inc., supra at 190, 89 I.D. at 606; James Moore, supra. 9/ Merely voicing an opinion is not sufficient to establish an affirmative defense. Sam Blankenship, supra at 39, 90 I.D. at 178. If the burden is carried, OSM's jurisdiction is defeated and its enforcement action must be vacated.

Both sound legal principles and important practical considerations support these precedents. Where legislation is remedial, as the Surface Mining Act is, "exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont and Northern Ry. v. Comm'n, 286 U.S. 299, 311-12 (1932). Further, the responsibility for bringing a case within an exception to a statute not contained in the enacting clause falls on the

7/ "A prima facie case is made where sufficient evidence is presented to establish the essential facts and which evidence will remain sufficient if not contradicted. It is evidence that will justify but not compel a finding in favor of the one presenting it." James Moore, supra at 223, 86 I.D. at 373; Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982). "How much evidence is required may, of course, vary with the nature of the case and with the relative availability of the evidence to the person charged with the burden of establishing the prima facie case." Rhonda Coal Corp., supra at 132, 89 I.D. at 464.
8/ It is of course possible that an applicant would choose to defend on either or both grounds.
9/ Cf. 43 CFR 4.1155 for the burden of proof in civil penalty proceedings.

party responding to a cause of action based on the statute. Sullivan v. Ward, 24 N.E.2d 672 (Mass. 1939); 130 A.L.R. 440 (1941). As a practical matter -- because the person would not be contesting jurisdiction -- it would usually be unnecessary for OSM to begin each hearing with a presentation of evidence concerning whether coal was extracted for a person's own noncommercial use, whether more than 2 acres were affected in extracting coal for commercial purposes, and whether the coal was extracted as an incidental part of a Federal, state, or local government-financed construction project. 30 U.S.C. § 1278 (Supp. IV 1980); 30 CFR 700.11. Also, where a person does assert entitlement to one of these exemptions, the information about his intended use, how much land was affected, or the relationship of the extraction to a government-financed project is usually more readily available to the person than to the Government. James Moore, supra at 224, 86 I.D. at 373. This is equally true concerning two other exemptions contained in 30 CFR 700.11, namely, whether the person intended to extract more or less than 250 tons of coal and whether the extraction of coal was incidental to the extraction of other minerals and constituted less than one-sixth of the total mineral tonnage.

In this case Smith failed to plead no jurisdiction on the part of OSM, as both Moore and his own response to the order to show cause indicated he should. 10/ Moreover, Smith did not prove he came within one of the exemptions. After hearing that 300 to 350 tons of coal had been delivered from Smith's site the day before, seeing Smith on the bulldozer at the site with the coal stockpile, and hearing no objection from Smith when told that he had disturbed more than 2 acres and removed more than 250 tons of coal, Begley had a reasonable basis for believing Smith's activities constituted surface coal mining operations. Since he had observed violations of the regulations, Begley issued the notice and order. At the hearing it was Smith's burden to demonstrate he had not excavated more than 250 tons of coal or had not disturbed more than 2 acres. He offered his opinion that only 200 to 250 tons of coal were hauled to the tipple, 11/ and that the remaining stockpile was

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10/ See note 5, supra. In addition to the paragraphs from the application for review quoted in this response the application also contained a paragraph stating: "Applicant submits that the actions of the inspector in issuing the above described notice of violation and cessation order were arbitrary and capricious, without authority in fact or law, and exceeded his authority as an authorized representative of the secretary." Neither this paragraph nor those quoted in note 5 allege with sufficient specificity to put OSM on notice that applicant claims entitlement to an exemption.

11/ Tr. 65-66:

"Q. [by Judge Torbett] Are you saying that that was less than 340 tons of coal?

"A. Yes, sir, I am.

"Q. Do you have any receipt or anything from the tipple?

"A. I have no receipts. They gave me none. We took it down there and dumped it. I don't even know whether they weighed it or not.

"Q. How do you know it's less than that?

"A. I don't know it's less. I'm just saying it was.

"Q. You're saying it was? Why are you saying it was?

"A. Well, I think I'm a pretty good judge of coal. Just like this pile of coal here. I'm saying there's not over 35 tons in it. He says it's

35 tons. 12/ These estimates total 235 to 285 tons, so it is twice as probable that the weight would be more than 250 tons than that it would not be, assuming equal chances that it would be at any one of the points within that range. The tipple is reported to have estimated 340 tons of coal hauled. 13/ Begley's estimate of the stockpile tonnage was 100 to 150 tons. 14/ An estimate based on the photographic evidence is more than 70 tons, 15/ closer to Begley's minimum estimate than to Smith's. Both men claim experience in coal mining. 16/ Taking all the conflicting estimates together, and discounting the reliability of each equally, it seems more likely that the total amount of coal excavated was more than 250 tons. At best, as Judge Torbett found, the evidence is in equipoise. In any event it is clear that Smith did not carry his burden of persuasion that the preponderance of the evidence showed he had excavated less than 250 tons. Nor did he present any evidence that he had affected less than 2 acres. He testified that he had not measured or paced off the area he

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150 tons. I think that I haul[ed] between 200 and 250 tons of coal. I don't think I haul[ed] 250 tons of coal.

* * * * * * *

"Q. So, where do you get your knowledge? Did you estimate the amount of coal at the tipple? Is that what you are saying?

"A. Yes, sir. I just looked at it. What we had hauled down there." Tr. 50:

"Q. [by counsel for Smith] How much coal did you remove from the property?

"A. I don't know exactly how much but I would say between 200 and 250 tons."

12/ Tr. 50. He added that it was more than the normal 25 to 30-ton truck load of coal and that the pile was about 7 feet high based on the height of the pickup truck shown next to it in exhibit A-7. Taking 7 feet as the height, we can fairly estimate the diameter of the pile at 32 feet. Assuming the pile was conical, its volume would be 1,876 cubic feet of coal. Assuming coal weighs 81 pounds per cubic foot (Peele, Mining Engineers' Handbook at 25-21 (3rd ed. 1941)), the pile would weigh 75.9 tons if it were solid, somewhat less in the broken-up form it was in.

13/ Tr. 61. Smith objects that this is hearsay (Appellant's Brief at 4). So it is, although hearsay is admissible in administrative proceedings and an objection to it goes only to its weight. Robert Bros. Coal Co., 2 IBSMA 284, 295, 87 I.D. 439, 445 (1980). In this proceeding the figure was used by OSM to show that Smith did not object to it when told about it (Tr. 12-13) and was mentioned by Smith in his direct testimony in the context of explaining that he did not object because he did not know how much coal there was at the time of the inspection (Tr. 61). In our review of this case we are referring to it only as one indication of the reliability of Smith's estimates.

14/ Tr. 31.

15/ See note 12, supra.

16/ Tr. 8, 45.

was working on. 17/ We conclude that the Administrative Law Judge correctly held that OSM had jurisdiction over Smith's operation.

[2] In his notice of appeal Smith claimed that OSM had not established any violation of the Act or regulations. His brief on this question, however, is directed to the issue discussed above, namely, whether the evidence showed more or less than 250 tons of coal had been excavated. The Administrative Law Judge found that

> [t]he proper signs and markers were not present; there was no evidence that topsoil or the top 6 inches of soil had been saved; surface drainage was not passing through a pond; the access road leading to the site did not have a durable surface and was not properly drained; the spoil had been placed on the downslope and was remaining there (Tr. 17, 18, 19, 21, 22; Exhibit R-1)

and concluded

> [t]he proof of the fact of violation as to this Notice of Violation is abundant and not seriously controverted by the applicant. The undersigned finds as a matter of fact that the separate violations contained in this Notice of Violation are sustained by the proof.

We agree. At the hearing Smith initially did not dispute the violations, then indicated only violations 2, 4, and 5 might be in issue. 18/ Begley's testimony concerning violation 2, failure to salvage topsoil as required by 30 CFR 715.16(a), was that there was no topsoil on any of the disturbed acres, either stockpiled or distributed. 19/ Smith's description of how he conducted his operation confirmed that he had made no effort to segregate topsoil. 20/ Concerning violation 5, placing spoil on the downslope contrary to 30 CFR 716.2(a)(1), Begley testified that in redisturbing the area Smith had pushed additional material on the downslope over the old material that had been placed there during the previous mining operation. 21/

17/ Tr. 63. On cross-examination, Begley's testimony about the area was confused. He stated that the length of the freshly disturbed area was approximately 2,000 "square" feet and its width 300 feet (Tr. 37). Two thousand times 300 feet would total in excess of 12 acres, considerably more than the 3 to 4 acres he testified was his estimate of the area affected (Tr. 9). Begley did not have his notes at the hearing to refresh his recollection, possibly because Smith's pleadings did not specifically indicate he planned to claim an exemption. See note 10, supra. Although it is possible to speculate about the reasons for this confusing testimony (Begley misremembered or misspoke, or was referring to the total area, not just the freshly disturbed area; or the transcript is in error), it is not necessary to do so: Smith presented no evidence indicating he was entitled to a 2-acre exemption.
18/ Tr. 16, 17, 20.
19/ Tr. 18.
20/ Tr. 44, 46, 57-58, 62.
21/ Tr. 19.

Smith's testimony confirmed this. 22/ Violation 4 concerned improper construction and maintenance of two access roads in violation of 30 CFR 715.17(1). Begley testified the roads were not drained or surfaced in accordance with the regulation. 23/ Smith's cross-examination of Begley concerned a third road not covered by the violation. 24/ His own testimony indicated only that one of the two roads had a ditch and a culvert and the other a ditch and two culverts, 25/ not that the roads were properly surfaced. We conclude that the Administrative Law Judge correctly held that OSM had established the existence of the five violations contained in the notice of violation, and that Smith failed to overcome that showing by a preponderance of evidence that the violations had not occurred.

[3] Finally, Smith argues that OSM should not have issued a cessation order for mining without a permit and that the Administrative Law Judge did not have authority to convert the cessation order into a notice of violation.

The testimony about whether Smith had an appropriate permit was in conflict. OSM said it checked Federal and state records and found no record of one, 26/ while Smith said he had one but did not introduce it into evidence. 27/ The Administrative Law Judge found he did not have one. He then concluded his decision:

> It is now clear under Board decisions that a Cessation Order issued for failure to have a permit is improper. The proper procedure would be to issue a Notice of Violation. The undersigned has the authority to modify the Cessation Order in question and change it into a Notice of Violation.

Earlier in the decision he had stated one of the issues as "[s]hould the undersigned grant Respondent's motion that the Cessation Order be modified, changing it into a Notice of Violation?"

It is true that, at the time of the inspection, a cessation order was not the appropriate enforcement action for mining without a permit, absent a showing of the conditions that would support an order in any event. Claypool Construction Co., 2 IBSMA 87, 87 I.D. 168 (1980); White Winter Coals, Inc., 1 IBSMA 305, 311-12, 86 I.D. 675, 678 (1979). 28/ It is also true that 30 U.S.C. § 1275(b) (Supp. IV 1980) authorizes the Secretary to modify a notice of violation or cessation order. 29/ Exercise of this authority, however, is predicated on findings of fact after a hearing. In this case the

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22/ Tr. 57, 63.
23/ Tr. 21-22, 34-35.
24/ Tr. 30.
25/ Tr. 47-48, 55.
26/ Tr. 15.
27/ Tr. 54, 61.
28/ For the current law to the contrary, see 30 CFR 722.11(c) and 843.11(a)(2) (47 FR 18555, 56-58 (Apr. 29, 1982)).
29/ 30 U.S.C. § 1275(b) provides in part: "(b) Upon receiving the report of such investigation [as is required by section 1275(a)], the Secretary shall

motion to modify the cessation order was made in OSM's posthearing brief, could not be responded to by Smith because posthearing briefs were ordered simultaneously, and was granted without any rationale by the Administrative Law Judge's decision. We cannot condone the granting of such relief without notice to the parties at the hearing and without the appropriate findings of fact and conclusions of law. 30/ Capital Coal Corp., 4 IBSMA 179, 89 I.D. 594 (1982); Cravat Coal Co., 2 IBSMA 136, 87 I.D. 308 (1980); Dean Trucking Co., 1 IBSMA 105, 86 I.D. 201 (1979); 43 CFR 4.1127. The portion of the Administrative Law Judge's decision changing the cessation order into a notice of violation is reversed, and the cessation order is vacated.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, in Secretarial Order No. 3092 (48 FR 22370 (May 18, 1983)), the decision of the Administrative Law Judge is affirmed in part and reversed in part.

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Will A. Irwin
Administrative Judge

We concur:

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Bruce R. Harris
Administrative Judge

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James L. Burski
Administrative Judge

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Gail M. Frazier
Administrative Judge

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Franklin D. Arness
Administrative Judge
Alternate Member

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C. Randall Grant, Jr.
Administrative Judge

make findings of fact, and shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the notice or order, or the modification, vacation, or termination of such notice or order complained of and incorporate his findings therein."

30/ We are especially unwilling to decide this question without briefing of several important legal issues involved, e.g., whether the action taken by the Administrative Law Judge in this case, rather than being characterized as modification of a cessation order, is not more accurately viewed as terminating a cessation order and issuing a notice of violation in its stead; whether, if it is properly so viewed, he has authority to issue a notice of violation; and what, if he does have such authority, the potential legal consequences are for the mine operator.

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

The issue presented is whether the United States enjoys a presumption that its jurisdiction attaches in every case.

The majority's rigid, unwavering insistence that anyone charged with a violation by an OSM inspector bears the burden of proving that the Government lacks jurisdiction, regardless of the factual circumstances, is a manifestation of a legal attitude which fosters injustice in cases such as this. There should be no legal presumption that any citizen who on one occasion extracts a little coal from a small area on the surface of his own land is subject to the punitive power of OSM unless he proves otherwise, and that OSM need not even demonstrate prima facie a reasonable basis for believing that the activity falls within the purview of its authority.

In proceedings of this kind, 43 CFR 4.1171 provides that "OSM shall have the burden of going forward to establish a prima facie case as to the validity of a notice, order, * * *," etc. (Emphasis added.) If there is any possible doubt or question of OSM's authority in the matter, then, in order to "establish a prima facie case as to the validity of the notice [or] order," it must be shown that OSM had some reasonable basis to conclude that it was invested with jurisdiction to issue such notice or order, particularly where, as in this case, its authority was challenged in the pleadings prior to the hearing. 1/ For, if, in fact, OSM had no jurisdiction of the thing complained of, there could be no violation!

As will be shown, OSM did make a feeble attempt to indicate prima facie that its inspector had a basis for believing that the alleged "violations" were within the scope of his authority. This attempt failed utterly, as there was no reasonable basis shown on which such belief could be founded.

1/ In his application for review (hearing), appellant specifically pled as follows:

"(2) Applicant alleges that all violations hereinabove referenced fail to state a condition which constitutes a violation of the federal regulation pertaining thereto.

"(3) Applicant denies that the conditions present and in existence at the site constituted violations as set forth in the NOV and cessation order.

"(4) Applicant submits that the actions of the inspector in issuing the above-described notice of violation and cessation order were arbitrary and capricious, without authority in fact or law, and exceeded his authority as an authorized representative of the secretary." [Emphasis added.]

Although the majority have expressed their opinion that the foregoing does not raise the issue of OSM's jurisdiction, (because it lacks "sufficient specificity." n10/, majority op.) it expressly challenges the lawful authority of the OSM inspector to issue the Notice of Violation (NOV) and Cessation Order (CO). This is a distinction without a difference, as "jurisdiction" is, essentially, legal authority to act. See Black's Law Dictionary (4th ed. 1951) 991.

Smith owns a home and adjacent property in Letcher County, Kentucky. On February 19, 1980, Roger Begley, an inspector for OSM, conducted an inspection of the Smith property. Upon arriving at the site of the disturbance, the inspector observed Smith operating a bulldozer, informed him that an OSM inspection was to be conducted, and then inspected the premises. At the conclusion of his inspection, Begley issued NOV No. 80-2-39-7 and CO No. 80-2-39-5.

Smith applied for review of the NOV and the CO, and an administrative hearing was held on December 3, 1980, before Administrative Law Judge Torbett. During the course of the hearing, Smith conceded that only violations 2, 4, and 5 of the NOV and the CO were in dispute, provided OSM had jurisdiction to apply Federal regulations to his operation, and OSM moved that the CO be modified to a NOV. In his decision of March 10, 1982, Judge Torbett held that OSM had the authority to regulate Smith's activities, OSM had presented a prima facie case that Smith had violated the regulations cited, and Smith had failed to persuasively rebut OSM's presentation.

Smith, in his statement of reasons, argues that Judge Torbett erroneously determined OSM had jurisdiction over his activities and improperly placed the burden of persuasion on him when OSM did not meet its burden of proof. We agree.

The Surface Mining Control and Reclamation Act of 1977 exempts from its purview "[t]he extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. § 1278 (Supp. IV 1980). The implementing regulation, 30 CFR 700.11, limits this exemption to a person who also does not intend to affect more than 2 acres in the course of a mining operation, and further exempts persons who do not extract more than 250 tons of coal and who do not intend to do so.

Over the course of many years of administrative appellate review this writer has never encountered a record of a contest proceeding so utterly devoid of relevant facts as this one. The proceeding below was so poorly prepared and presented by both sides as to be almost totally unproductive of any evidence of probative value.

Roger Begley, the OSM inspector who issued the NOV and the CO, and the Government's only witness, testified that he "had learned from the tipple at the foot of the hill that approximately 300 to 350 tons of coal had been taken there from that site the evening before * * *" (Tr. 13). This represented his entire testimony concerning coal removed from the premises. The figure "approximately 300 to 350 tons," is obviously a crude estimate. Tipples do not talk. Begley did not identify the source of this information, and he was not asked about it either on direct or cross examination. He did not say that he personally observed the coal, nor did he give even approximate dimensions of the pile, although we presume he was at the tipple and had the opportunity to view and measure it. He did not reveal whom he had talked to at the tipple concerning this delivery, or what that person's qualifications were for estimating the volume and weight of a quantity of coal. For all we can tell from the record, Begley had no personal knowledge whatever of this

coal delivered at the tipple, and may have gained his entire fund of information concerning it from a conversation with the village idiot. This is not probative evidence.

Smith's testimony concerning the coal delivery to the tipple was almost equally unenlightening. He was not present when the coal was removed and taken to the tipple. He said he did not know how much had been delivered, but he estimated between 200 and 250 tons (Tr. 50). It was just taken there and dumped. The tipple would not buy it because the ash content was too high. Smith was given no receipts, and he does not even know if the coal was weighed. He was willing to "swear under oath" that it was less than 250 tons, but he did not see it loaded and shipped. He was not asked who actually mined it, or if he saw it on the ground before it was taken to the tipple. He did testify that he personally went down to the tipple and looked at it and based his estimate on what he saw "after it was stacked up" (Tr. 65-67). This is apparently the only testimony by either side concerning the coal removed from the premises that is based on personal knowledge. He did not testify to the dimensions of the pile, nor was he questioned concerning such dimensions. No one asked him who had hauled the coal to the tipple, what size trucks were used, or how many loads were hauled. No one inquired as to the method or basis for his estimate. Although he testified that "I think I'm a pretty good judge of coal," no one asked him (or Begley) what a cubic yard of coal might weigh.

With regard to the coal remaining on the site, Begley estimated it at 100 to 150 tons (Tr. 31), but Smith was firmly of the opinion that "there's not over 35 tons" (Tr. 66). Again, neither witness was asked to explain the basis for his estimate; no dimensions of the pile were given or asked for; nor was any attempt made by the Government to resolve this very substantial disparity. Both Smith and Begley had long experience in coal mining, and it would be expected that each would be qualified to make a reasonably accurate estimate. 2/

Counsel for Smith did introduce three photographs of the stockpiled coal, taken at rather long range, one of which shows a pick-up truck beside the coal pile for scale (Exh. A-7). It appears to be a small, cone-shaped pile with the apex about the height of the roof of the cab of the pick-up, which Smith estimated to be about 7 feet high. Again, nothing more was elicited by either side as to the relationship of this measurement to the weight of the coal in the pile. However, viewing the pile as it is depicted in the photographs, we would find it very difficult to believe that it was comprised of 100 tons of coal, let alone 150 tons.

We conclude that OSM failed to establish by probative evidence that 250 tons of coal were removed for commercial purposes, or that OSM had a reasonable basis for belief that over 250 tons had been removed.

2/ Smith testified that earlier in his life he had spent 17 years as a coal miner in underground mines (Tr. 45).

Turning now to the other jurisdictional standard, we begin with the observation that the more than 2 acres of surface disturbance required to confer jurisdiction must be attributable to activities associated with the surface mining of coal subsequent to the enactment of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (Supp. V 1981).

Smith testified that on this property, which he owned, the first mining had been done in the 1930's; that two deep mines had been developed in 1975; that there had been surface mining there in 1963 and again in 1974; that there was a previous mining road already on the property when he took up residence in 1975 (Tr. 42). Apparently, all these previous mining ventures had been conducted by others. He further testified that he operated a meat-packing plant and a sawmill next to his home. He had been logging from the property in the general vicinity of the surface disturbance from the spring of 1978 until "sometime this summer," (the hearing was held in 1980), using a small bulldozer to haul out the logs (Tr. 49). Smith testified that he used the old mining road to haul his logs, and built a stretch of road and cleared a storage area which this case apparently does not concern. Smith further testified that the "bench" area where he is charged with surface disturbance had been left unreclaimed after the earlier mining activities. He stated that he was attempting to reclaim this land to serve as pasture and the site of a feed lot; that his purpose in taking the heavy equipment in there was not to remove the coal (Tr. 53), but to reclaim the land. Some of this testimony follows:

> Q. On February 19, 1980 were you engaged in any type of surface disturbance using heavy equipment or any type of equipment in the area addressed by Mr. Begley?
>
> * * * * * * *
>
> A. At the time he come up on the hill, we were reclaiming it. We were spreading dirt out over the rocks and things that were there is what we were doing that particular day.
>
> Q. What equipment was on the property at the time?
>
> A. I believe that there were two bulldozers. -- I believe is what I had on the job that day. There might have been an end loader, but I don't think there was.
>
> * * * * * * *
>
> Q. On the date in question you say you were reclaiming. Now, what were you doing on the property with the heavy equipment prior to that time?
>
> A. We were making land for the lot -- pasture land -- stock for the cattle -- We were filling up land that had been disturbed before which had a big gulley in it and held ponds of

water and we were filling it up to approximately 15 feet where it was piled up on the outer slope. It was huge rocks, dirt and everything piled up. We were pushing it back and leveling it in which we did about 15 foot deep on the whole area he's talking about.

* * * * * * *

Q. Had there been any attempt at reclamation [by] who did the strip mining previously?

A. Not the first part of it there hadn't been.

Q. What do you mean by the first part of it?

A. Where we were working, there hadn't been.

Q. What did the property look like at the first part of it or do you recall?

A. Before?

Q. Before you started work on it?

A. Well, when you went to the top of the hill where the road leaves the other road going on around to the Holcomb property, from there around there was a high -- the highwall was approximately 30, 40, 50 feet high and on the outer wall was probably 20, 30, feet deep where they piled stuff up. Rocks and everything from this area and there was water. You couldn't -- The road down around through there, you could just barely get a four wheel truck around through it it was such a bad place.

Q. Had there been any rocks or so-called spoil put over the downslope?

A. Yes, there had.

(Tr. 44-47).

Q. Have you done any reclamation on this area since he cited you?

A. Yes, I did.

Q. What did you do?

A. I finished reclaiming the land, put red dog on the road, put in two culverts on this area right here, the disturbed area.

Q. Did you cut any drainage ditches out?

A. Yes, I did.

(Tr. 52).

Q. At the time that you went up on the hill with your equipment, was there any topsoil remaining on the area mined by the previous strip mining operation?

A. No topsoil, no, sir.

Q. What had happened to the topsoil?

A. Well, it had just been pushed up before it was mixed up with the rocks and the other dirt. There was some yellow dirt but not topsoil.

Q. You mentioned something earlier about water. Was there any water that was standing?

A. Yes, there was water standing for the first 300 feet. Water anywhere from 12 inches to 24 inches deep through that area.

(Tr. 56-57).

Q. Did you scrape off any of the top layer of the dirt from this area that you were newly working in to use to -- and place it in a protected area to use back when you were reclaiming?

A. Yes. We scraped off the dirt, what dirt there was. There wasn't any topsoil there. It was just rock and dirt but we saved what dirt we could to reclaim what we did that with. You see, there's rocks and stuff in it now. Small rocks.

Q. Where did you put it?

A. We just spread it out over it. We started out -- That's what we started doing was pushing this big rock down and in the hole.

Q. So as you excavated, you just pushed the material directly to some spot then?

A. Yes. We were doing that the day that you came up there. I was on the dozer doing that the day he walked up there.

Q. This area that Mr. Begley has testified about that he paced off, is the area there around the contour on that bench and it's not the area at the top of mountain. Is that true?

A. That's true.

Q. And, some areas around the contour where you were working you did push some dirt from the side or below the actual line of the contour?

A. In one spot over some rocks and trees. Just one small area.

Q. The coal that you removed from this site you took it down the road through that gate and over to the tipple which is across the tracks. Is that correct?

A. Yes, sir.

Q. That was the only way in and out of that site?

A. Right.

Q. Have you measured or paced off the area up there that you were working on?

A. No, sir, I have not.

(Tr. 62-63).

The point illustrated by the foregoing is that all of the fresh surface disturbance was not shown to be directly or indirectly attributable to appellant's surface mining of a small amount of coal from the 10- to 13-inch seam exposed there. Apparently some of the disturbance was attributable to Smith's logging, some to his reclamation of the land from the effect of previous mining activities and his grading of that land for his pasture/feed lot installation. It is equally apparent that he did engage in some surface mining, and he must have disturbed some area of the surface in doing so. But the record is devoid of any effort on the part of anyone to delineate the area disturbed by Smith's mining activities and distinguish that area from those disturbed by his other activities.

Begley's testimony on the subject was vague and served only to compound the confusion. He testified that Smith had told him at the time of his inspection that the work he was doing there was to construct a feed lot for his cattle (Tr. 33). Nevertheless, he apparently included all of the freshly disturbed surface area in his jurisdictional estimate.

Q. Would you please give us a general description of this site as you saw it on February 19, 1980?

A. That day to enter the site we had to walk up the mountain. The gate was locked at the bottom of the road. It was Inspector Tom Clements and myself. That's on entering the site. There was approximately four acres disturbed on the bench. Freshly disturbed was another three to four acres with another three to four acres of old disturbance there. The access road was approximately 4,000 feet long -- 3,500 to 4,000. The area did not have any silt control. The highwalls had not been eliminated where the coal had been removed. There was a small stockpile out there on the bench in the pit area. Some spoil had been placed on the outslopes on the downslopes approximately 10 to

15 feet below the coal site. This is in addition to old spoil that had been there probably several years.

Q. Mr. Begley, you say that observed approximately three to four acres of fresh disturbance. Could you please describe to us how you were able to make a determination that there was fresh disturbance and some was old disturbance?

A. The old disturbance had eroded and sparse revegetation -- natural revegetation on it. The fresh areas were freshly disturbed. Very little erosion had occurred yet and material was loose and not compacted and no revegetation on there.

(Tr. 9-10).

Begley tried to explain how he measured this area of "fresh disturbance," but he had not bothered to bring his notes, and instead tried to rely on memory. In consequence, his testimony regarding his computation was so confusing as to be unintelligible and meaningless.

Q. In computing your acreage affected supposedly, did you include the road leading from the county highway up to where Mr. Smith had his equipment?

* * * * * * *

THE WITNESS: To write the violation, no sir, I didn't.

BY MR. COOK:

Q. You didn't take that into consideration?

A. No, sir.

Q. How did you calculate the area affected?

A. Of the freshly disturbed area on the contour bench times the length times the width will give you the square feet divided by 43,560 will give you the number of acres.

Q. What is the length of the so-called freshly disturbed area?

A. Approximately 2,000 square feet. [Emphasis added.]

Q. What is the width?

A. Approximately 300 feet.

Q. How did you arrive at those figures?

A. The length -- The measurement you mean?

Q. Yes.

A. I paced them.

Q. What is the length of one of your paces?

A. Three feet.

Q. Exactly?

A. Within a quarter of an inch.

Q. And, it came out exactly 2,000 feet and exactly 300 feet?

A. I said approximately 2,000 feet and I don't have my original notes with me.

Q. How do you know what the figures are if you don't have your notes with you?

A. I remember what the approximate figures were.

Q. Do you also remember the exact acreage you computed?

A. No, sir.

Q. No further questions.

JUDGE TORBETT: Any more questions of this witness?

MR. GAULT: Yes. I have just a few, Your Honor.

REDIRECT EXAMINATION

BY MR. GAULT:

Q. Mr. Begley, what was the purpose of your measuring or pacing this site?

A. To determine if the disturbed area was more than two acres.

(Tr. 36-38).

We assume that Begley simply mis-spoke when he testified that the length of the disturbed area was 2,000 square feet; otherwise he would have been describing an area of only about one-twentieth of an acre. But if we follow his testimony that the area was 2,000 feet long and 300 feet wide, and apply his formula of multiplying those two figures and dividing by 43,560 (the number of square feet in an acre), we find the area described encompasses

13.77 + acres, an area which is mentioned nowhere in the entire record, and which is completely disconsonant with his repeated assertions that the freshly disturbed area was about 3 to 4 acres. Allowing for the possibility that the transcript was in error, or that Begley mis-spoke, and that the 2,000-foot dimension should be 200, the area would be only a little less than one and four-tenths acres; less than the jurisdictional amount.

We quite agree with the reference at n.7 of the majority opinion to the quotation from Rhonda Coal Corp., viz: "How much evidence is required [to make a prima facie case] may, of course, vary with the nature of the case and with the relative availability of the evidence to the person charged with the burden of establishing the prima facie case." By regulation, supra, OSM had the burden of establishing a prima facie case, which we hold included the obligation to show reasonable basis for belief that the activity was within the scope of OSM's authority. Unless OSM's inspector got his information concerning the coal delivery from some remote source, we presume that he was physically present at the tipple, where there must have been abundant evidence of the coal delivered the previous evening. He was also present on the site where the operation was conducted, with the owner also present. There, too, the evidence was available. If he obtained any evidence at the tipple, it was not elicited at the hearing, and his effort to establish jurisdiction based on the area disturbed appears in the record as utter nonsense. The facts were available to OSM. It failed to present them, and thus it failed its basic procedural obligation.

We would reverse the decision appealed from and order the NOV and the CO be canceled.

_____
Edward W. Stuebing
Administrative Judge

We concur:

_____
Anne Poindexter Lewis
Administrative Judge

_____
Douglas E. Henriques
Administrative Judge

_____
R. W. Mullen
Administrative Judge